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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 56.

THE ATLANTIC REFINING COMPANY, owner of the Tank Steamship "Bohemian Club",

Petitioner,

—against—

A. P. MOLLER, claimant of the M/V "Laura Maersk",

Respondent.

BRIEF FOR RESPONDENT.

J. HARRY LA BRUM,
LEONARD J. MATTESON,
Counsel for Respondent.

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—against—

A. P. MOLLER, claimant of the M/V "Laura Maersk",

Respondent.

BRIEF FOR RESPONDENT.

Opinions Below.

The opinion of the District Court containing its findings of fact and conclusions of law is officially reported at 40 F. Supp. 641 and is printed in the record herein at pages 92 to 100. The opinions of the Circuit Court of Appeals on argument and reargument are reported at 134 F. (2d) 1000 and are printed in the record herein at pages 103 to 111 and pages 115 to 119.

Jurisdiction.

Jurisdiction is provided by 28 U. S. C. 347 (a).

The Concurrent Findings of the Courts Below.

The facts were found by the District Court as follows:

On the morning of December 20, 1939, the tank steamship "Bohemian Club", which had been proceeding up

the Delaware River toward Philadelphia with a cargo of crude oil, while proceeding on the Bulkhead Bar Range, encountered a dense fog and, after proceeding a short distance, came to anchor at 7:41 A. M. (Fdgs. 5, 7 and 8, R. 93). Shortly after 10 A. M., Buoy 2-D on the easterly side of the channel at the intersection of the Bulkhead Bar and Deepwater Point Range channels first became visible through the fog about 150 feet distant at an angle of about 45° off her starboard bow (Fdg. 9, R. 93). The heading of the "Bohemian Club" was then approximately 30° (Fdg. 10, R. 93). The distance between the Bulkhead Bar Range Line and the easterly boundary of the channel, on which Buoy 2-D is located, is about 400 feet (Fdg. 11, R. 93) and the distance from the range line to the westerly boundary of the channel is about 800 feet (Fdg. 12, R. 93). The tide was ebb at the time Buoy 2-D was sighted and was due to change to flood approximately two hours later* (Fdg. 13, R. 93). In order to lie clear of Buoy 2-D when the tide turned, the "Bohemian Club" at 10:13 A. M. lifted her anchor and put her engines slow ahead with her rudder hard right. At 10:15 A. M. the engines were stopped and at 10:18 A. M. anchor was dropped, the fog having set in again obscuring the buoy (Fdg. 14, R. 93). During the above maneuver, the heading of the ship changed to the westward from 30° to 356° (Fdg. 15, R. 94). When the anchor was dropped her heading settled again at 30° which heading was maintained until immediately prior to the collision (Fdg. 16, R. 94). The set of the ebb tide was in a southwesterly direction and, as a result of this maneuver, the "Bohemian Club" was located to the westward farther into the channel (Fdgs. 17 and 18, R. 94).

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* Since the tide changed from flood to ebb at 9:10 A. M. (R. 88) this is a substantial understatement. The next change would be more than six hours later (R. 89) or after 3 P. M., at least 5 hours after the "Bohemian Club" shifted her position.

The master of the "Bohemian Club" did not know the exact position of his ship after this maneuver (Fdg. 19, R. 94).

At 11:35 A. M., the "Bohemian Club" was located in the channel with her bow approximately on the Bulkhead Bar Range line near its juncture with the Deepwater Point Range line and her stern tailing to the westward thereof (Fdg. 21, R. 94). The District Court found specifically:

> "A vessel anchored as the 'Bohemian Club' was at the time of the collision, on the range line of one range close to the angular juncture of that range with another, is anchored in such a manner as to present an obstruction to the free passage of other vessels, particularly ones approaching from the other range" (Fdg. 24, R. 94).

The "Laura Maersk" proceeded down the Delaware River at various speeds (Fdgs. 28 to 33, R. 95). At 11:34 A. M., the "Laura Maersk" stopped her engines abreast of Buoy 1-D on the westerly side of the channel at the intersection of the Deepwater Point and Bulkhead Bar Range channels (Fdg. 33, R. 95). Her rudder was put hard-a-port in order to bring her around the 34 degrees left turn into the Bulkhead Bar Range channel (Fdg. 34, R. 95). At this time fog, which had been previously intermittent, enveloped the "Laura Maersk" and her engines were put full speed astern and then stopped in order to listen for signals from other vessels (Fdg. 35, R. 95). At the moment her engines were stopped, the fog was dispelled or pierced so that the "Bohemian Club" could be seen 400 feet away (Fdg. 36, R. 95). The engines of the "Laura Maersk" were put full speed astern and she blew the appropriate signal (Fdg. 38). Nevertheless, the "Laura Maersk" and the "Bohemian Club"

collided head on at about 11:37 A. M. on or about the range line near the upper end of the Bulkhead Bar Range, both vessels suffering damage (Fdg. 40, R. 96).

These findings of fact are not disputed* and were adopted on appeal by the Circuit Court of Appeals (R. 103 to 106, 116).

The Decision of the District Court.

The District Court concluded that those in charge of the "Bohemian Club" were without fault in anchoring on the easterly side of the upper end of the Bulkhead Bar Range channel at 7:41 A. M. (Con. 1, R. 100), and that those in charge of the "Bohemian Club" were justified in moving her shortly after 10 A. M. and in anchoring her again at 10:18 (Con. 2, R. 100). The court further held that those in charge of the "Laura Maersk" were negligent and that the collision was due solely to fault on the part of the "Laura Maersk" (Con. 4 and 5, R. 100). In explanation of its conclusions, the District Court, under the heading of "Discussion", stated that the original decision of the master of the "Bohemian Club" to anchor at the easterly edge of the channel was "a wise one" (R. 97) and that his conclusion that this position was one which might result in fouling the buoy on the change of tide from ebb to flood was "reasonable" (R. 97). The District Judge further stated that the action of the master in undertaking to shift the position of his vessel, when the fog "disappeared sufficiently for the Buoy 2-D to be seen" (R. 97), and anchoring her again after only a brief interval "when the fog again obscured indicia of position" (Con. 2, R. 100) in a position athwart the range line, where she presented an obstruction to the

* Petitioner's Brief, p. 2.

free passage of other vessels, particularly vessels bound downstream (Fdg. 24), was not improper under the circumstances (R. 98).

The Decision of the Circuit Court of Appeals.

The sole difference between the decision of the Circuit Court of Appeals and the decision of the District Court is that the Circuit Court of Appeals held, on the facts as found by the District Court that *the master of the "Bohemian Club" was not justified under the circumstances* in shifting the position of his vessel from one of comparative safety to one where she obstructed the passage of other vessels. On this narrow question, Biggs, *P. J.*, dissented.

The difference between the view of the dissenting judge and the view of the majority is solely on the question as to whether the possibility of fouling the buoy on the turn of the tide was a danger of such consequence as to justify the master of the "Bohemian Club" at the time and under the circumstances in shifting from a position at his right hand edge of the channel to midstream, an action which subjected his vessel to the obviously greater danger of collision with vessels bound downstream, whose free passage the "Bohemian Club" then "particularly" obstructed (Fdg. 24, R. 94). On rehearing, the majority of the court reiterated their views first expressed (R. 115) and Biggs, *P. J.*, renewed his dissent (R. 117).

The concurrent finding of the District Court and of the Circuit Court of Appeals (as to which Biggs, *P. J.* did not dissent) that "a vessel anchored as the 'Bohemian Club' was at the time of the collision" presented "an obstruction to the free passage of other vessels, particularly ones approaching from the other range" (Fdg. 24, R. 94; R. 119) is a finding that at the time of the collision the "Bohemian

Club" was anchored in violation of the Act of Mar. 3, 1899, c. 425, §15, 30 Stat. 1152, 33 U. S. C. A. §409,* which provides that:

> "It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft; * * *."

In considering the question presented, the majority of the Circuit Court of Appeals pointed out that under the rule laid down in *The Pennsylvania*, 19 Wall. (86 U. S.) 125, 136 and subsequent cases "* * * when a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been, or that it probably was not, but that it could not have been." (R. 109) Biggs, *P. J.* in his dissent did not refer to this rule.

The Question Presented.

The only question presented by the difference between the view of the majority of the Circuit Court of Appeals and that of the dissenting judge, or by the difference between the decision of the Circuit Court of Appeals and the decision of the District Court is:

> Did the possibility that the "Bohemian Club" might foul buoy 2-D on the turn of the tide some two hours or more later, present a danger of such consequence as to justify the action of the master of the "Bohemian Club" in shifting his vessel at 10:13 A. M. from a position near the easterly edge of the channel to a position

* The statute is printed in full as Appendix I to this brief, page 22.

in midstream athwart the range line in which position the "Bohemian Club" presented an obstruction to the free passage of other vessels, particularly ones approaching from the other range, as did the "Laura Maersk"?

The Question as Stated by Petitioner.

The question presented as stated by the petitioner (Petitioner's Brief, p. 7) is we believe inadequate in that it excludes any comparison of the relatively trivial risk involved in the fouling of the buoy with the much greater risk of collision with downbound vessels produced by the change of the "Bohemian Club's" position. The question is not whether the "Bohemian Club" violated the Act of Congress of March 3, 1899 (Appendix I, p. 22) for she plainly did violate the specific provision of that Act when she anchored the second time in a position which obstructed "the free passage of other vessels, particularly ones approaching from the other range" (Fdg. 24). The only question presented is whether that violation can be excused or condoned on the ground of necessity.

Petitioner's counsel recognizes the true nature of the question when he says that "the real question" is:

> "* * * whether, in view of the grounds upon which the majority of the Circuit Court of Appeals held that she had unjustifiably violated the statute, the decision of her master to move away from the buoy 2D, in order to avoid the danger of fouling it, was a statutory fault" (Petitioner's Brief, p. 15).

And again, when he says:

> "We therefore respectfully submit that in deciding to move his vessel away from the buoy, when the

opportunity presented itself; the master of the 'Bohemian Club' acted prudently * * *" (Petitioner's Brief, p. 22).

Petitioner's argument is that the decision of the Circuit Court of Appeals was induced by a "misapprehension" of the facts (Petitioner's Brief, p. 23). We shall show that this argument is not sustainable.

POINT I.

There is no substance to petitioner's assertion that the decision of the Circuit Court of Appeals was induced by a misapprehension of the uncontradicted facts in evidence.

In Point IV of petitioner's brief, p. 23, it is asserted that the decision of the majority of the Circuit Court of Appeals was induced by a misapprehension of the uncontradicted facts in evidence. The argument does not support this statement.

Petitioner's counsel states, at p. 23, that—"The majority of the court were of the opinion that since 'three vessels proceeding down the river' (R. 104) had safely passed the 'Bohemian Club' before she moved, she did not prevent or obstruct the passage of other vessels at the point where she first anchored at 7:41 A. M."

Petitioner's counsel then urges that the majority of the court "failed to appreciate that the 'Bohemian Club' was then anchored on the easterly side of the range line, and that the three vessels proceeding down the river, which passed her, were on the westerly, their starboard, side of the range line" (Petitioner's Brief, pp. 23-24).

Petitioner's counsel has clearly erred. The majority of the court did appreciate that the "Bohemian Club" was

at that time anchored on the easterly side of the range line for, in the passage from the opinion referred to, at R. 104, incompletely quoted in petitioner's brief, the majority specifically said:

> "Actually the position of the tanker, as anchored, was on the easterly side of the channel * * *" (R. 104).

Petitioner's counsel is also incorrect in stating that the vessels which passed the "Bohemian Club" were on the westerly, their starboard, side of the range line. These vessels passed, as petitioner's counsel states, about 200 ft. off (Petitioner's Brief, p. 23; R. 7, 22, 23, 29). As the "Bohemian Club" was then anchored 150 ft. from the easterly side of the channel (Fdg. 9, R. 93) which is approximately 400 ft. east of the range line (Fdg. 11, R. 93) it is clear that these vessels passed down almost exactly on the range line, not to the west of it.

Petitioner's counsel then quotes (p. 24) a passage from the opinion of the dissenting judge at R. 118, in which the dissenting judge attributes to the majority the view that the "Bohemian Club" was not in a position of danger in the east part of the channel and was in a position of danger in the west part of the channel and criticises the majority pointing out that if a vessel had been negligently operated upstream on the east side of the range line while the "Bohemian Club" was anchored in her first position a collision inevitably would have occurred. Apparently petitioner's counsel endorses this criticism.*

* Appended to Petitioner's Brief is a diagram, allegedly to scale, purporting to show the two anchored positions of the "Bohemian Club". The diagram is misleading in that the dimensions of the "Bohemian Club" are incorrectly represented. According to the scale the shape representing the space occupied by the "Bohemian Club" is twice too wide and substantially too long. We shall comment on this fact further on the oral argument if necessary.

But both the dissenting judge and petitioner's counsel have misapprehended the decision of the majority. The majority concede that the first anchorage, taken by necessity, might not have incurred "liability-creating possibilities" (R. 115). The point is not important because the collision was not with an upbound vessel and the "Laura Maersk", downbound, probably could not have complained that her passage was obstructed by the "Bohemian Club" while that vessel was on the easterly side of the channel. However, when the "Bohemian Club" attempted to move, without justifiable reason, under circumstances under which she almost inevitably lost her bearings and was forced to anchor in a position where she obstructed vessels bound either up or down, and particularly those bound down, thereby greatly increasing danger of collision to herself and others, the majority said that she could no longer rely on the argument of necessity to avoid the charge of negligence. The majority in their opinion on reargument said:

> "It may be conceded that when the 'Bohemian Club' first anchored at 7:41 A. M. on the eastern side of the channel, being then unable to proceed because of the density of the fog, her action in such circumstances did not incur liability-creating possibilities. But it is quite another thing to say that, because the anchorage first taken, out of necessity, would not have furnished a basis of liability, the ship may thereafter lift anchor and maneuver about in the channel, while still obscured by fog, in the hope of finding a supposed better anchorage and then, because of the fog, anchor in the channel without knowledge of her position and in a manner so as to prevent or obstruct the passage of other vessels or craft, and still not be subject to a charge of negligence. To so hold would be to impose a hazard upon navigation which no decided case has yet done and

which we do not think would comport with the intendment of the law. See Act of March 3, 1899, c. 425, §15, 30 Stat. 1152, 33 U. S. C. A. §409" (R. 115, 116).

The downbound vessels which passed the "Laura Maersk" safely when she was anchored in her first position would surely have struck her if she had then been in the position to which she later shifted. Moreover, the possibility of danger of collision from upbound vessels is largely imaginary for vessels bound upstream below Buoy 2-D were fog bound by dense fog (R. 2, 7, 9, 10). The fog above Buoy 2-D was only intermittent (Fdg. 28, R. 95). Only downbound vessels were proceeding at the time.

It was for shifting the position of the "Bohemian Club" to the position in midchannel, where she presented an obstruction to either up or downbound vessels navigating on the ranges as is customary in these waters, and particularly to downbound vessels making the turn from the range above (Fdg. 24, R. 94), that the majority held the "Bohemian Club" at fault.

Petitioner's counsel then quotes the footnote to the opinion of the majority on rehearing (R. 116) in which the court referred to the testimony of the master of one of the downbound ships who testified that it was his intention, if the fog continued, to anchor "off the ranges * * * and be out of the channel of anything that was moving". In the footnote referred to, after quoting this testimony, the court said:

> "Yet that was precisely what the master of the 'Bohemian Club' did not do when he changed his place of anchorage."

Obviously the court meant that the "Bohemian Club" did not anchor "off the ranges" but, on the contrary, anchored precisely on the range line. However, petitioner's counsel

argues from this statement that the majority of the Circuit Court of Appeals intended to hold the master of the "Bohemian Club" at fault for not anchoring outside the channel limits. He says:

> "It would thus appear that the majority of the court were of the opinion that the fault of the master of the 'Bohemian Club' lay in not doing what the master of the 'White Flash' intended to do, *i. e.*, 'anchor off the ranges'—'out of the channel of anything that was moving'; and that conclusion, necessarily assumes that the 'Bohemian Club' could have anchored 'off the ranges', *i. e., outside the channel limits*" (p. 25).

Counsel thereupon cites evidence to show that the "Bohemian Club" could not have anchored outside the channel limits because of her draft and the danger of running aground (Petitioner's pp. 25-26). It is, therefore, argued that the decision of the majority placed an impossible burden on the "Bohemian Club".

The assumption of petitioner's counsel that there is no difference between anchoring "off the ranges" and "outside the channel limits" is clearly erroneous. We append to this brief (Appendix II) an excerpt from the U. S. C. & G. S. chart covering this locality, showing the channels and the ranges. It will be noted that the range line is an imaginary line on which a vessel navigates approximately in midchannel in each of the channel reaches. The range lines are indicated by markers or lights at one, or the other, or both ends of each channel reach. The channel limits are substantially to either side of the range lines, the distance being dependent on the width of the channel and the locality. The channel limits are marked by buoys which are placed along the channel boundaries. Flashing buoys, such as 2-D, mark channel intersections. It is obviously quite possible for a vessel to anchor off the ranges and consequently out of the usual track of vessels bound

up or down and still be within the channel limits. The terms "off the ranges" and "outside the channel limits" are not synonymous, as petitioner's counsel would have the court believe.

It is entirely clear from the opinions of the majority that they were not laying an obligation on the "Bohemian Club" to have anchored outside the channel altogether. The majority said on rehearing:

> "But the district judge did not find, nor do we, that the 'Bohemian Club's' first anchorage similarly offended. Indeed such a broad finding would be unwarranted on the record in this case * * *" (R. 116).

The passage shows clearly that the majority did not hold the "Bohemian Club" at fault because she failed to move entirely outside the channel limits for she was within the channel limits when she first anchored.

The majority did hold that with respect to this collision with the "Laura Maersk", a downbound vessel, the "Bohemian Club" was guilty of fault because she unjustifiably moved from a position at the easterly side of the channel, of which the "Laura Maersk" could not have complained, to a position athwart the range line, where she obstructed the free passage of vessels in either direction and particularly those, such as the "Laura Maersk", approaching from the other range.

The charge that the majority of the Circuit Court of Appeals either misapprehended the facts or laid an impossible burden on the "Bohemian Club" is, we submit, not substantiated.

The other charges in Point IV, namely, that the decision of the majority is unsupported by authority and misinterprets the Act of March 3, 1899, we shall show, are equally unsound.

POINT II.

The violation of the statute by the "Bohemian Club" cannot be justified and is inexcusable.

The nature of the argument for the petitioner in this case unfortunately requires a discussion of the evidence.

When the "Bohemian Club" originally anchored along the easterly side of the channel at 7:41 A. M., the tide was flood (R. 88). Approximately an hour and a half later the tide changed to ebb (9:10 A. M.) (R. 88). The "Bohemian Club" did not foul the buoy when it swung with the tide from flood to ebb (R. 89) and there is no suggestion in the record that any difficulty was encountered. Yet, less than an hour after the ebb tide had begun to run, the "Bohemian Club" was moved from a comparatively safe anchorage to a place where she was a positive danger to all vessels navigating in either direction on the Bulkhead Bar Range. The majority of the Circuit Court of Appeals correctly found that there was no real existing necessity to move the "Bohemian Club" and that the maneuver which the master elected to undertake was ill chosen when "merely to avoid the possibility of fouling the buoy * * * he lifted anchor and maneuvered his boat in weather so unsettled that within five minutes after lifting anchor and when, because of the density of the redescending fog, he no longer knew where he was, he found it necessary to again drop anchor" (R. 109).

The statement contained in the opinion of the dissenting judge that "he took his vessel out of positive danger while he could do so" (R. 111), which forms the basis for petitioner's argument here, is without foundation in fact. The "positive danger" referred to was only the fancied danger of fouling the buoy.* Such a danger if

* No one but Biggs, *P. J.*, has suggested that there was danger that the ship might have gone aground.

it existed was trivial. Contact with a floating buoy could in no event have caused any substantial injury to a large steamer such as the "Bohemian Club". It would only have possibly resulted in dragging or displacement of the buoy. If such a danger actually existed, it was present at the time when the ship first anchored. It likewise was present when the vessel swung with the change of the tide from flood to ebb. If it was a real danger, it would have manifested itself at that time. It may therefore be safely concluded that this alleged "positive danger" did not in fact exist. Certainly, there could have existed no more danger at a swing from ebb to flood than from flood to ebb. In fact, there would have been less danger to the ship, if any existed at all, because on the first swing from flood to ebb, the captain of the "Bohemian Club" acknowledged that he did not know the position of his ship while on the second swing he would have known his position by reason of his knowledge of the location of the buoy. In any case, as stated in his testimony, he could have prevented the fouling of the buoy "with the use of my engines" (R. 85). Obviously, the majority of the Circuit Court of Appeals were justified in minimizing the alleged danger and holding that it afforded no justification for the change of the "Bohemian Club's" position to one presenting a much greater danger, *i. e.*, of collision with down bound vessels.

Under the circumstances, the majority of the Circuit Court very properly found:

> "* * * That the circumstances which attended the collision are incapable of absolving the 'Bohemian Club' of liability for contributing to the cause of the collision. As the trial court found, she anchored in the channel 'in such a manner as to present an obstruction to the free passage of other vessels particularly ones approaching from the other range'. Her

action was a positive violation of a statutory rule which is not to be justified by a necessity resulting from her own deliberate choice of a change of position in foggy weather, unless it be shown that her changed position did not contribute to the collision. That the evidence fails to disclose" (R. 107).

This finding by the majority of the Circuit Court clearly determines the issues raised against the petitioner. It is further buttressed by the statements of petitioner's own witnesses to the effect that it was not safe to proceed at any time from the original anchoring at 7:41 A. M. until the time of the collision; and that the visibility at no time from that of the original anchoring until the time of collision was more than 200 ft. (Rowe, R, 4-7-8-15; 81, 82, 83; Nordskog, R. 17; Cullison, R. 23; Down, R. 25; Lyons, R. 49-50; Haman, R. 58; Walker, R. 77).

The majority of the Circuit Court of Appeals were fully cognizant of the authorities cited by the petitioner, when, in their original opinion they condemned the conduct of the master in the following language (R. 109):

"In the present instance, when the fog had lifted somewhat around 10 A. M., the master of the 'Bohemian Club' found that his vessel was anchored on the easterly side of the channel near the bend as determined by the intersecting range courses. That was plain from her position with relation to buoy 2-D which had become visible. The master also knew that, while the tanker had been so anchored for more than two hours, three vessels proceeding downstream around the turn opposite buoy 2-D had passed in safety. *Yet, merely to avoid the possibility of fouling the buoy, when his vessel would swing round on the turn of the tide, he lifted anchor and maneuvered his boat in weather so unsettled that within five min-*

utes after lifting anchor and when, because of the density of the redescending fog, he no longer knew where he was, he found it necessary again to drop anchor. As a consequence the tanker was farther out in the channel with her bow on the Bulkhead Bar Range course and her stern tailing off to the west of the course—a position particularly obstructive to vessels proceeding downstream and required to make the swing to the left in turning from the Deepwater Point Range. The master, having deliberately lain his vessel open to the peril which caused him to violate a statutory rule, may not then point to the fog for legal justification of his conduct and particularly not, when he is unable to show that his vessel's position neither prevented nor obstructed the passage of other boats in the channel." (Italics ours.)

The Court after having considered the matter a second time on reargument confirmed its decision condemning the conduct of the master of the "Bohemian Club".

It is submitted that the Court below did not err in condemning the judgment of the master and holding the "Bohemian Club" jointly at fault with the "Laura Maersk".

POINT III.

On the facts as found, the decision of the Circuit Court of Appeals is in accord with the controlling authorities.

There is no conflict in the authorities. As the petitioner points out in Point I of its brief (p. 8) it has been held that the prohibition of the Act of March 3, 1899, which provides that it shall not be lawful for a vessel to anchor in a navigable channel in such a manner as to prevent or obstruct the passage of other vessels is not

absolute. In other words, it may be condoned or justified under extraordinary circumstances. The decisions cited by the petitioner in support of this proposition are based on the facts and circumstances as they appeared in the respective cases. In the case at bar the decision of the Circuit Court of Appeals is distinguishable from these authorities because of the finding of fact made by that court that there was nothing in the circumstances of the case to justify the action of the master of the "Bohemian Club" in removing his vessel from a position of comparative safety, in close proximity to Buoy 2-D on the easterly side of the channel, to a position with her bow directly on the range line, *i. e.*, that line in the channel on which vessels proceeding either up or downstream would strive to navigate in order to maintain their proper position in the navigable channel in the river.

The decision of the Circuit Court of Appeals that the "Bohemian Club" was at fault for anchoring *without actual necessity on the range line where she constituted a positive obstruction to vessels navigating in the channel* finds support in countless authorities, some of which are the following:

The Caldy (D. C., D. Md., 1903), 123 Fed. 802, affirmed (C. C. A., 4th, 1907), 153 Fed. 837;

The Southern Cross (C. C. A., 2nd, 1937), 93 F. (2d) 297;

The Limon (C. C. A., 1st, 1929), 35 F. (2d) 730;

The Vera (D. C., D. Mass., 1912), 224 Fed. 998, affirmed (C. C. A., 1st, 1915), 226 Fed. 369;

The City of Birmingham (C. C. A., 2nd, 1905), 138 Fed. 555;

The Welcombe (D. C., E. D. N. Y., 1937), 19 F. Supp. 874;

The Lehigh (D. C., E. D. N. Y., 1935), 15 F. Supp. 425,

The Itasca (D. C., S. D., Ga., E. D., 1901), 117 Fed. 885;

In re Clyde-Mallory Lines (D. C., S. D. N. Y., 1937), 1937 A. M. C. 837;

The Georgia (D. C., D. R. I., 1913), 208 Fed. 635;

The Hans Maersk (C. C. A., 4th, 1937), 87 F. (2d) 193.

POINT IV.

Since the "Bohemian Club", at the time of the collision, was anchored in the channel in violation of the statute in such a manner as to obstruct the passage of other vessels, particularly vessels bound down, as was the "Laura Maersk", the rule of *The Pennsylvania*, 19 Wall. 125, 136, is applicable. There is a presumption that her fault, if not the sole cause, was at least a contributory cause of the disaster and the burden rests upon her to show that her fault could not have been a cause of the collision. The major and minor fault rule has no application.

In Point V of petitioner's brief, it is argued that the fault of the "Bohemian Club" was minor and that the fault of the "Laura Maersk" was gross and that consequently the court should resolve in favor of the "Bohemian Club" any doubts regarding her management, or the contribution of her fault, if any, to the collision. However, neither the Circuit Court of Appeals nor the District Court characterized the fault of the "Laura Maersk" as gross and the argument is not supported by findings or testimony. Moreover, the Circuit Court of Appeals pointed out (R. 109) that the rule laid down by this court in *The Pennsylvania*, 19 Wall. (86 U. S.) 125, 136, is applicable to the fault of the "Bohemian Club" in anchoring

athwart the range line in a position to obstruct the free passage of vessels bound either up or down the channel, since her fault was a violation of a statutory rule intended to prevent collisions. In *The Pennsylvania*, this court said at p. 136:

> "But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been."

As pointed out by the Circuit Court of Appeals, this burden the owner of the "Bohemian Club" was unable to meet. The Court said:

> "Indeed, in the light of the circumstances, it was impossible for the libellant to show that the anchorage of the tanker on the range course could not have been a cause of the collision. As found both below and here, the tanker's anchorage prevented and obstructed the free passage of other vessels on the course" (R. 110).

The rule of *The Pennsylvania* has been frequently reiterated by this Court.

> *Lie, etc.* v. *San Francisco & Portland S. S. Co.*, 243 U. S. 291, 298;
> *The Martello*, 153 U. S. 64;
> *Belden* v. *Chase*, 150 U. S. 674, 699.

This rule has been frequently applied in the various circuits:

> *Universal Ins. Co.* v. *The Coast Banker* (C. C. A. 9), 129 F. (2d) 395, 398;

Malton Oil Transfer Co. v. *The Grecian* (C. C. A. 2), 129 F. (2d) 618, 620;
General Seafoods Corp. v. *J. S. Packard Dredging Co.* (C. C. A. 1), 120 F. (2d) 117, 120.

Moreover, as pointed out in the case last cited, the so-called major and minor fault rule is "artificial and misleading unless very carefully applied". *General Seafoods Corp.* v. *J. S. Packard D. Co.*, 120 F. (2d) 117, 119. In that case, the court pointed out further (p. 119):

> "Even though the first vessel is grossly at fault, a plain fault on the part of the other vessel is not excused. *The Albert Dumois*, 1900, 177 U. S. 240, 253, 20 S. Ct. 595, 44 L. Ed. 751; *The Yamashita Kisen Kabushiki Kaisha* v. *McCormick Inter. S. S. Co.*, 9 Cir. 927, 20 F. 2d 25; *The San Simeon; supra.*"

In view of the statutory fault of the "Bohemian Club", we submit that it is clear that the "Bohemian Club" is not entitled to invoke the so-called major and minor fault rule and that that rule is inapplicable to the facts of this case.

CONCLUSION.

The judgment of the Circuit Court of Appeals should be affirmed, with costs.

Respectfully submitted,

J. HARRY LA BRUM,
LEONARD J. MATTESON,
Counsel for Respondent.

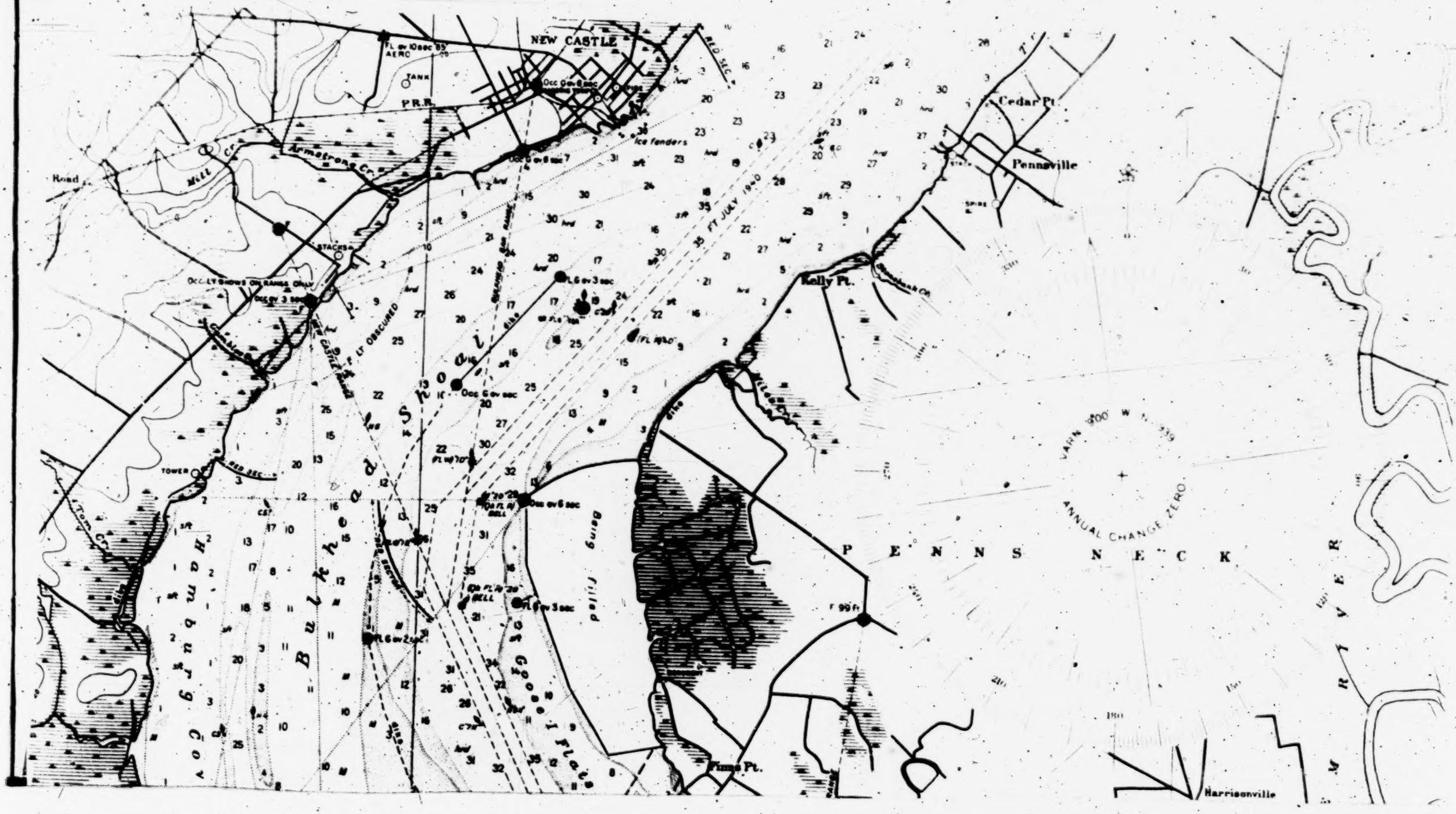
Appendix I.

Act of March 3, 1899, c. 425, Sec. 15, 30 Stat. 1152; U. S. C. Title 33, Sec. 409:

"It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft; or to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels; or to float loose timber and logs, or to float what is known as sack rafts of timber and logs in streams or channels actually navigated by steamboats in such manner as to obstruct, impede, or endanger navigation. And whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidently or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as hereinafter provided for."

Appendix II.

Excerpt from U. S. C. & G. S. Chart No. 294.



Kelly Pt.

PENNS NECK

VARN 9°00' W (IN 1939)

ANNUAL CHANGE ZERO

Finns Pt.

Harrisonville

Fen Patch I.

Marsh Pt.

DELAWARE CITY

Bulkhead Shoal

Cabbage Island Flats

Cabbage Island Channel

Nautical Miles

Yards